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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent,

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a former President and two of his former assistants are absolutely immune from civil suit for damages for their actions while in office, including the removal of a civil servant in retaliation for his testimony to Congress, in violation of his rights under the first amendment and federal statutes.*

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* Petitioners also present the question of the appealability under the collateral order doctrine of a district court order denying defendants' motions for summary judgment on the ground of absolute immunity. Petitioners Harlow and Butterfield further seek to raise questions not presented in their notice of appeal below or in their petition for certiorari. These issues are treated in Part V of this Brief, pp. 41 to 48, *infra*.

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BRIEF FOR RESPONDENT

STATEMENT

This case concerns the degree of immunity from civil damages available to a former President and presidential assistants for actions while in office. Petitioners invoke absolute immunity as a bar to trial and a complete defense to liability in a damage action brought by respondent. The gravamen of respondent's action is that petitioner Nixon, while serving as President, and petitioners Harlow and Butterfield, while serving as his assistants,

knowingly participated in a conspiracy to remove respondent from his position as a management analyst with the Department of the Air Force in retaliation for his testimony to Congress.

The basic facts of this case[1] are not significantly controverted:

1. Before November 13, 1968, Ernest Fitzgerald had an exemplary record of public service that included letters of commendation and award nominations.

2. On November 13, 1968, Fitzgerald testified truthfully and accurately before a joint congressional subcommittee on a significant public issue.

3. Shortly thereafter, Fitzgerald became the object of a removal effort, and within a year his position was abolished in a "reorganization."

4. Petitioner Nixon later stated, publicly and privately, that as President he had ordered the discharge of Fitzgerald, that he had made the decision, and that he stuck by it.

A. Fitzgerald's Testimony

On November 13, 1968—after Mr. Nixon was elected President, but before he took office—respondent Fitzgerald, an Air Force civilian management analyst, was called to testify before a subcommittee of the Joint Economic Committee of Congress.[2] Testifying with the

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[1] Citations to the record will follow the format used in petitioner Nixon's brief. Material in the Joint Appendix will be cited as "JA ——". Depositions not reprinted in the Joint Appendix will be cited as "[Deponent] Dep. (R ——) ——". "R. ——" refers to the docket entries reprinted in the Joint Appendix, JA 1a-53a.

[2] Fitzgerald was initially approached in the summer of 1968 by a member of the subcommittee staff who had been informed that Fitzgerald was "an interesting person to talk to because of his expertise" in defense procurement and cost controls. JA 122a.

approval of the Department of Defense,[3] Fitzgerald disclosed for the first time that the projected cost of the C-5A cargo airplane might run as much as $2 billion over the original estimate.[4] Fitzgerald's testimony did not disclose any confidential or classified information and did not directly criticize anyone in the Department of Defense. His superiors later publicly acknowledged that his testimony had been truthful, proper, and accurate.[5]

Behind the scenes, however, Fitzgerald's testimony triggered a bitter reaction within the Pentagon. A memorandum was prepared for then-Secretary of the Air Force Harold Brown outlining three methods by which Fitzgerald could be removed, including a "reduction-in-force" to discharge Fitzgerald without observing the usual Civil Service safeguards. JA 209a-211a; *cf.* JA

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[3] *Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess. 199-200 (1968-1969) [hereinafter cited as *C-5A Hearings*].

[4] Fitzgerald did not volunteer this information. The chairman of the subcommittee, Senator William Proxmire, prompted Fitzgerald to concede that this figure "could be approximately right." *C-5A Hearings*, *supra* note 3, at 200-01.

[5] Defense Secretary Melvin R. Laird, for example, stated before a congressional subcommittee in 1970 that "Mr. Fitzgerald's position on the C-5A cost overrun has been correct." *Department of Defense Appropriations for 1970: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess. 457 (1970), JA 257a. *See also The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. 101 (1969) (statement of Secretary of the Air Force Robert C. Seamans, Jr.) [hereinafter cited as *Fitzgerald Hearings*]. The latter hearings explored the reasons for Fitzgerald's dismissal. The focus of the hearings was "whether Congress has a right to ask and receive nonclassified information about public matters and contracts without those who give such information, truthfully and properly, losing their jobs." *Id.* at 2 (statement of Chairman Proxmire). One prominent exhibit was a letter to the President signed by 61 Members of Congress protesting the "firing of this dedicated public servant" as a "punitive action." *Id.* at 115, JA 177a-179a.

202a.[6] On January 9, 1969, three days later, Secretary Brown met with the incoming Secretary of the Air Force, Robert Seamans. Brown told Seamans that the Air Force was upset because Fitzgerald had publicly aired his views on the C-5A before Congress. Seamans apparently told Brown he recognized that Fitzgerald was "of no use to the Air Force." JA 194a.

Shortly after Seamans took office in February 1969, Fitzgerald's immediate superior, Thomas Nielsen, began pressing Seamans to reorganize the Office of Financial Management "with an idea that Ernie's job wouldn't be there anymore." JA 203a. Seaman's refrained from adopting this proposal until a new assistant secretary could be named to replace Nielsen, who was leaving the government. *Id.*

B. White House Involvement

On May 9, 1969, Seamans called petitioner Harlow to discuss the Fitzgerald matter. JA 186a. Six days later, Seamans met with Harlow at a White House breakfast and solicited his advice "as to timing & how to procede."

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[6] By contrast, before Fitzgerald testified on the C-5A, Secretary Brown had approved a plan to reorganize Fitzgerald's office so as to *increase* his responsibilities in the cost control area. JA 293a-295a. This was not surprising in light of Fitzgerald's distinguished record of public service. He was nominated for the Department of Defense Distinguished Civilian Service Award in February 1967 and for the Air Force Association's Citation of Honor in November 1967. JA 237a-255a.

In seeking to show that Air Force action against Fitzgerald was not retaliation for his testimony, petitioners suggest that the Civil Service Commission appeals examiner found that Fitzgerald had planted a story with the *Washington Post* to put "the Air Force in a bad light." Harlow/Butterfield Brief at 4; *see* Nixon Brief at 6 n.3. There is no evidence in the record that Fitzgerald was responsible for the story, and the appeals examiner referred to this merely as a supposition of Air Force officials. *Decision on the Appeal of A. Ernest Fitzgerald*, U.S. Civil Service Commission, Appeals Examining Office at 8, 16-17 (Sept. 18, 1973) [hereinafter cited as *CSC Decision*], JA 74a, 82a.

JA 187a; *cf.* JA 205a.[7] Although aware that the "reorganization" plan was tied to Fitzgerald's congressional testimony, *see* JA 150-152a, Harlow did not advise Seamans to drop the idea, but instead counseled him that the timing was wrong. JA 205a.[8]

On June 17, 1969, Fitzgerald was called before the congressional subcommittee for further testimony on defense cost overruns. Following this appearance, Fitzgerald's standing in the Air Force deteriorated further, although the Air Force never attempted to refute any of Fitzgerald's testimony. *Fitzgerald Hearings*, *supra* note 5, at 15.

On November 4, 1969, less than a year after his initial testimony, the Air Force announced that Fitzgerald's job would be eliminated January 5, 1970, as a result of a "reorganization" of his office. JA 212a. On the day the announcement was made, Secretary Seamans again consulted with Harlow. JA 186a. The next day, Nixon aide Clark Mollenhoff, the designated White House "ombudsman," called Seamans to request an explanation of Fitzgerald's firing. JA 206a-207a. The Air Force failed to persuade Mollenhoff that the "reorganization" was not a pretext, and Mollenhoff prepared a memorandum for the President, dated November 17, 1969, warning that the Fitzgerald firing would be widely perceived as retaliation for Fitzgerald's testimony on the C-5A. JA 259a-261a.

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[7] Contrary to Harlow's present account, *see* Harlow/Butterfield Brief at 6, this was more than a "happenstance" meeting. At his deposition, Harlow recalled that Seamans called him out of a very important meeting to talk about the Fitzgerald matter. JA 113a.

[8] Two days later, on May 17, 1969, Secretary Seamans and Secretary Laird met with the President to discuss cancellation of the Manned Orbiting Laboratory. A presidential aide present at the meeting later recalled that Mr. Nixon referred with disapproval to the "Fitzgerald kind of thing." (Schlesinger Dep. (R. 432) at 13-14, 31-33). This, of course, places Mr. Nixon's awareness of the Fitzgerald matter some six months earlier than the date referred to in Nixon Brief at 9.

Mollenhoff's memorandum was addressed to the President through Harlow, who took it to Mr. Nixon and discussed it with him. JA 259a; Mollenhoff Deposition, JA 128a-129a.[9] As Mr. Nixon later recalled it, Harlow "was all for canning" Fitzgerald. JA 284a. The Fitzgerald matter was recalled to be "all Harlow's ball game." *Id.*[10] The Fitzgerald case was also brought to the President's attention by White House aide Patrick Buchanan in the preparation for President Nixon's December 8, 1969, press conference. In a one-page memorandum enclosed in President Nixon's briefing book, Buchanan endorsed Mollenhoff's view that the Air Force was "firing . . . a good public servant" and joined in Mollenhoff's suggestion that the President order Fitzgerald retained in a Defense Department job. JA 269a.[11]

At a later press conference, however, President Nixon acknowledged that he personally was responsible for the

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[9] Nixon asserts that this memorandum never reached him, citing the deposition testimony of Egil Krogh and Harlow. Nixon Brief at 8 n.5. Krogh and Harlow's vague and forgetful statements are directly contradicted by Mollenhoff's testimony that Harlow assured him the memo had been discussed with the President. Mollenhoff Deposition, JA 128a-129a. Discovery cannot be said to have "disclosed" the correct answer on this issue. *Compare* Nixon Brief at 8 n.5. Moreover, Mollenhoff's statement tends to show that, contrary to the suggestion in his brief, Mr. Nixon was aware of the Fitzgerald case well before preparation began for his December 8, 1969 press conference. *Compare id.* at 9.

[10] Harlow had conversations with Seamans regarding Fitzgerald's termination on four separate occasions: May 9, 1969; May 15, 1969; November 4, 1969; and December 5, 1969. JA 186a. Harlow also discussed the matter with Nixon. *See* JA 221a.

[11] At no point in the correspondence to Mr. Nixon did either Mollenhoff or Buchanan state as his personal opinion that the widespread public impression of Fitzgerald's firing as retaliatory "was erroneous." *Compare* Nixon Brief at 9. Buchanan did suggest, apparently as a public relations move, that President Nixon should say at his press conference that this impression was erroneous. JA 269a.

firing: "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it." JA 185a. Although the President's press spokesman later attempted to retract this statement, JA 196a-199a, the White House tapes evidence Nixon's contemporaneous view of what he meant. Just hours after the press conference, Nixon told aide Charles Colson, "This guy that was fired. I'd marked it in the news summary. That's how that happened. I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it." JA 214-215a.

A few minutes later, President Nixon had a conversation with John Ehrlichman in which he recalled the reason that Fitzgerald had been fired. In the conversation, Nixon told Ehrlichman that he "was aware of the case" because "Harlow had raised it with me I think." The conversation continued:

E: So did Clar—, so did Mollenhoff, interestingly enough, uh, this guy, had talked with both Mollenhoff and Harlow here. And I believe [that] at one time or another they both talked to you about it. But Harlow particularly talked to you about it. But you see [one fact]—

P: [unintelligible] canned.

E: —whether or not he should be, uh, well, he really wasn't fired, he was sort of transferred into a non-existent job.

P: So Harlow [unintelligible].

E: Oh yeah, yeah, definitely.

P: Well, that's what I thought.

E: He was a, he was a thorn in everybody's side, you see—

P: Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly].[12]

During 1969, petitioner Butterfield, a former Air Force colonel working in the White House, undertook a personal effort to see that Fitzgerald's employment was terminated. As early as May 1969, Butterfield circulated a memorandum inside the White House stating that Fitzgerald was planning to "blow the whistle" on "shoddy purchasing practices" in the Department of the Navy [*sic*] and noting that these allegations had been referred to the FBI for investigation. JA 274a. In January 1970, as Fitzgerald's Air Force job was being terminated, Butterfield called H.R. Haldeman to urge that Fitzgerald not be retained or reemployed. JA 279a.

Butterfield expressed the same views in writing, addressing a memorandum to Haldeman, with copies to Ehrlichman, Colson, Kissinger, and at least four other White House officials. Rather than reemploy Fitzgerald, Butterfield said, "[we] should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part." JA 181a.[13]

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[12] JA 221a. The specificity of this conversation is inconsistent with Nixon's later assertion that he had confused the Fitzgerald case with another matter. Indeed, the conversation occurs on the White House tapes *after* the point when President Nixon supposedly recognized that he was confusing Fitzgerald with Gordon Rule. *Compare* Harlow/Butterfield Brief at 10. Moreover, both Mollenhoff and Harlow had left the White House well before Rule's employment became an issue.

[13] Butterfield admitted to a journalist in 1973 that his action in writing and circulating this memorandum was not connected to his official duties. "I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all. My role

C. Subsequent Events

Following his dismissal, Fitzgerald filed an action with the Civil Service Commission seeking reinstatement to his former position. After three years of litigation,[14] his case finally came up for public hearing in January 1973. Under questioning about who had approved the "reorganization" plan that led to Fitzgerald's dismissal, Seamans invoked executive privilege. JA 191a.[15] At the President's press conference the next day, Mollenhoff, by then a reporter covering the White House, asked Mr. Nixon if he had approved Seamans' use of executive privilege. The President responded:

> In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility in the White House—in this case it was a proper area in which the executive privilege should have been used.

JA 183a. Again, the White House tapes disclose Mr. Nixon's purpose. Referring to the firing of Fitzgerald, Mr. Nixon noted that Seamans had claimed executive privilege "because he knew that I had ordered it . . . . [T]hat's why I didn't back off of that." JA 215a.

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was almost purely administrative. . . . My memo was just from Alex Butterfield to Bob Hald[eman,] sort of two people, not in any official way at all." JA 297a.

[14] The proceeding was substantially extended by the government's appeal of a decision affirming Fitzgerald's right to an open hearing. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

[15] Although Seamans at one point testified that he had "never received any instruction" regarding the Fitzgerald dismissal, his full testimony indicates that he was attempting to avoid disclosing the true extent of White House involvement in the matter. In response to the direct question, "Did you consult with anyone or receive the advice of anyone in the White House?," Seamans stated, "That is the question I am not sure I have to answer." R. 255, Attachment I at 495.

To permit Seamans to continue to invoke executive privilege, and thus conceal White House involvement, the President directed Ehrlichman to prepare "the most godawful gobbledygook" statement on executive privilege "that will allow us to do everything that we want." JA 217a. When Seamans testified at the CSC hearing the following week, he again invoked executive privilege and refused to discuss his consultations with the White House. JA 300a-301a.[16]

Further to conceal the President's role in approving Fitzgerald's firing, press spokesman Ron Ziegler told the White House press corps on February 1, 1973, the day after the President's press conference, that Mr. Nixon "misspoke" himself when he admitted having made the

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[16] The petitioners rely heavily on the conclusions of the Civil Service appeals examiner, although as a result of Seamans' invocation of executive privilege, the examiner did not have a full record before him. *See, e.g.*, Nixon Brief at 4, 6 n.3, 12; Harlow/Butterfield Brief at 4, 6, 9. Moreover, the CSC proceeding was tainted from the outset. In May 1969, Secretary Seamans consulted with Robert Hampton, CSC Chairman, to determine how best to get rid of Fitzgerald. Seamans remembered Hampton telling him that, in light of Fitzgerald's protected job status, the "only alternative is to abolish his job." JA 205a. Later, with Hampton still Chairman, the Commission's appeals examining office was called upon to review the legality of Fitzgerald's removal.

The appeals examiner had no subpoena power, and Fitzgerald was unable to develop a full record at the administrative level. Secretary Seamans' testimony was riddled with inaccuracies and distortions. To take just one example, Seamans was asked about the President's statement at a January 31, 1973 press conference that "Mr. Seamans must have been talkin' to someone who had discussed the matter with me." Seamans testified that this was a "false statement." R. 255, Attachment I, p. 830. Yet Seamans knew that he had frequently discussed the matter with Harlow and Mollenhoff. Because Fitzgerald had no access to the documents demonstrating White House involvement until discovery began in this case, he was unable effectively to challenge Seamans' testimony at the administrative hearing.

decision to fire Fitzgerald. Ziegler also stated, in direct contradiction to disclosures on the White House tapes:

> We can find no record—the President requested that a check be made of this—of the matter ever being brought to the President's attention for a decision. So the decision regarding the reorganization that took place in the Air Force, which dealt with Mr. Fitzgerald, was a matter dealt with solely by the Air Force.

JA 196a.

On September 18, 1973, the CSC appeals examiner issued a decision ordering Fitzgerald "restored retroactively to January 5, 1970 to the position from which he was improperly separated." *CSC Decision, supra* note 6, at 20.[17] Although this decision provided an award of back pay, the award did not carry interest nor did it compensate Fitzgerald in any other way for his wrongful termination.

The present action, seeking damages, was instituted in the district court for the District of Columbia in January 1974. Nixon was named as a defendant in an amended complaint filed in July 1978. On February 12, 1980, petitioners moved for summary judgment. This was Nixon's second, Harlow's second, and Butterfield's third summary judgment motion. The district court denied their motions, ruling that petitioners were not absolutely immune, that genuine issues of fact precluded summary judgment on the issue of qualified immunity, and that Fitzgerald's complaint stated valid claims under the first amendment, 5 U.S.C. § 7211, and 18 U.S.C. § 1505. The district court denied a motion to certify these rulings for interlocutory appeal. Petitioners appealed the portion of the order denying absolute im-

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[17] Despite this order, entered more than eight years ago, Fitzgerald has still not obtained reinstatement to a position equivalent to his former one. *Fitzgerald v. Hampton*, No. 76-1486 (D.D.C. Mar. 3, 1981).

munity, invoking the collateral order doctrine. The Court of Appeals for the District of Columbia Circuit dismissed petitioners' appeals on April 30, 1980, and denied motions for rehearing and for rehearing en banc on July 14, 1980. This Court granted writs of certiorari on June 22, 1981.

SUMMARY OF ARGUMENT

I

Nixon makes the sweeping argument that he is absolutely immune from suit for damages for all actions he took while President. Not only does this assertion ignore the applicable decisions of the Court, but it is based on a supposed "historical understanding" that Mr. Nixon cannot establish. He relies on the silence of the Constitutional Convention about the liability of the President to civil suit when it framed the impeachment remedy and mechanisms of political accountability. But these mechanisms, as the Framers recognized, were directed at wrongs against the public as a whole—political wrongs—not at the deprivation of individual rights. The President was not accorded a "single privilege" by the Constitution; not a "single distinction . . . more" is attached to him than to "the lowest officer in the republic." President Jackson recognized in 1834 that the President is "liable to the private action of any party . . . in the same manner and to the same extent as the humblest functionary."

Against these and other statements, petitioner offers only comments concerning the President's "official inviolability" while in office. They do not support Mr. Nixon's contentions in this case, in which he was named as a defendant nearly four years after he left office. Mr. Nixon argues that the "historical understanding" of absolute presidential immunity is confirmed by the paucity of suits against the President. But there are other, more plausible explanations for the dearth of suits, including the difficulty of obtaining venue and personal jurisdiction over the President or a former President.

Nixon's position also does not square with the decisions of the Court, which hold that absolute immunity is not a badge of office, but is applied only where it is functionally required. Mr. Nixon offers no justification for according absolute immunity to the President while denying it to his counterparts in state governments and to Cabinet officers. The Court's decisions in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Butz v. Economou*, 438 U.S. 478 (1978), require not that the President be absolutely immune from suit, but that he be accorded a qualified immunity, whose applicability depends upon the circumstances of each case.

II

Nixon asserts that the presidential office requires absolute immunity. But he fails to establish that qualified immunity, especially applied on the sliding scale the Court endorsed in *Scheuer* and *Butz*, is inadequate to ensure the effective functioning of the Presidency. Absolute presidential immunity would sacrifice the interests of individuals, such as respondent in this case, whose rights have been violated by illegal and unconstitutional action of the President and his advisers. An appropriate balance requires qualified, not absolute immunity for the President, as well as for his assistants.

III

Nixon argues that the separation of powers requires absolute immunity for the President. In this argument, he seriously misapprehends the meaning of that doctrine. Separation of powers requires the accountability of executive officials who interfere with the ability of Congress to obtain information needed to perform its independent constitutional functions. This congressional interest is clearly at stake in this case. Moreover, Mr. Nixon's argument exaggerates the degree of intrusiveness into presidential communications involved in a civil damage suit like this one.

IV

Even if petitioners were otherwise entitled to absolute immunity, their claims are unavailing in this case because they have not established that their actions with respect to the termination of Mr. Fitzgerald's employment were within the scope of their authority. Unless the district court was clearly in error in ruling that there are genuine issues of disputed fact regarding the scope of each petitioner's authority, its denial of summary judgment should be affirmed.

The President has no constitutional authority to remove inferior officers whose appointment Congress has vested in the head of a department. Nor does the President's statutory authority over the Department of the Air Force extend to directing the Secretary to disregard protections accorded a veteran's preference employee like Fitzgerald by statute and departmental regulations. Regardless of Nixon's purpose, he was beyond the scope of his authority as President if, as he stated, he ordered Fitzgerald to be fired.

V

Harlow and Butterfield dispute the existence of the causes of action Fitzgerald has invoked. This issue is not properly before the Court. Fitzgerald's constitutional cause of action is supported by the Court's prior decisions. Implication of the statutory causes of action Fitzgerald invokes is appropriate under the tests enunciated by the Court; they are fully supported by congressional intent and the terms of the applicable statutes.

On the principal issue, petitioners have made no case for absolute immunity for the President or his assistants. And they have not established that they are entitled to absolute immunity in this case, even if it were otherwise available to the President and his aides. Accordingly, the Court should affirm and remand to the district court.

ARGUMENT

I. NEITHER CONSTITUTIONAL HISTORY NOR THE DECISIONS OF THE COURT SUPPORTS ABSOLUTE PRESIDENTIAL IMMUNITY

Mr. Nixon contends that, by virtue of the office he held, he is absolutely immune from liability in damages for all actions while in office, under any circumstances. This sweeping contention finds no support in constitutional history, and it does not square with the decisions of the Court.[18]

A. There Is No Constitutional or Historical Basis for Absolute Presidential Immunity

There is no direct evidence that the Framers intended the President to be absolutely immune from civil suit. Had they so intended, they could have expressly provided for executive immunity, as they did for legislative immunity in the Speech or Debate Clause. U.S. Const. art. 1, § 6. "[T]he necessity of considering what privileges ought to be allowed to the Executive" was suggested to the Constitutional Convention by James Madison.[19] But the Constitution is silent on executive immunity.

The Constitution's silence on the point was not inadvertent. James Wilson, who has been credited with the design of the Presidency, *see* Nixon Brief at 24 n.10, told the Pennsylvania ratifying convention that the President was deliberately given no privileges by the Constitution:

> [T]hat officer is placed high, and is possessed of power far from being contemptible, yet not a single

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[18] If the Court rejects absolute immunity, it need not consider the scope of qualified immunity that is appropriate in this case. Not only was that issue not before the court of appeals, but its determination "will necessarily be related to facts as yet not established . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

[19] 2 M. Farrand, *The Records of the Federal Convention of 1787* at 503 (1937).

> privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.[20]

Wilson rebutted the contention that the proposed Constitution created an artistocratic government, saying:

> What peculiar rights have been reserved to any class of men, on any occasion? Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him, in this system, more than there is to the lowest officer in the republic? . . . Far, far other is the genius of this system.[21]

Against the evidence of the intent of the Framers to deny the President the attributes and privileges of the English monarch,[22] petitioner Nixon cites only discussions of the means by which the Framers intended to ensure the *political* accountability of the President: elections, impeachment, and the separation of powers. But neither these means nor criminal prosecution were regarded as remedies for wrongs done to an individual. Impeachment, for example, was directed at offenses that "relate chiefly

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[20] 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis in original omitted).

[21] *Id.* at 523.

[22] Charles Pinckney, who had been a delegate to the Constitutional Convention, told the Senate in 1800 that the Framers were careful to restrict privileges:

> The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

Annals of Cong., 6th Cong. 74 (1800).

to injuries done immediately to society itself."[23] As Governor Johnston told the North Carolina ratifying convention:

> [I]mpeachment is very different in its nature from what the learned gentleman . . . supposes it to be. If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment . . . is a mode of trial pointed out for great misdemeanors against the public.[24]

The inclusion in the Constitution of provisions governing impeachment, removal, and subsequent criminal prosecution of the President, Vice President, and other civil officers lends no support to Mr. Nixon's argument that the Framers intended to immunize the President from private civil actions.

In the state ratifying conventions, it was recognized that federal officers would be amenable to private civil actions. Richard Dobbs Spaight, who had been a delegate to the Philadelphia convention, told the North Carolina convention:

> [I]t was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law.[25]

Similarly, Mr. Maclaine said:

> The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong in-

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[23] *The Federalist* No. 65 at 423-24 (Modern Library ed.) (A. Hamilton). *See also, e.g.*, 4 Elliot's Debates 113 (Iredell).

[24] 4 Elliot's Debates 48 (emphasis in original omitted). Johnston was responding to the argument, analogous to petitioner Nixon's contention, that impeachment is the sole remedy for wrongdoing by federal officers against individuals.

[25] *Id.* at 37.

> structions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law.[26]

The statements made in the course of framing and ratifying the Constitution do not support Nixon's position. Nor do the observations of John Adams and Oliver Ellsworth in the First Congress that Nixon cites. Nixon Brief at 26. These observations, as reported by William Maclay, addressed a question that is not before the Court in this case: namely, whether an *incumbent* President is amenable to process in a civil suit. Adams' and Ellsworth's views on this question were far from universally shared. Senator Maclay himself disagreed strongly. He characterized their observations as "only part of their old system of giving the President, as far as possible, every appendage of royalty." [27]

The executive branch in the 1830's recognized the President's liability for damages in civil actions. In 1834, President Andrew Jackson protested to the Senate that its censure of him for removing the Secretary of the Treasury had no constitutional basis. Jackson listed "the proper and only modes in which the President of the United States is to be held accountable for his official conduct." Among them, according to President Jackson:

> [The President] is . . . liable to the private action of any party who may have been injured by his illegal mandates or instructions in the same manner and to the same extent as the humblest functionary.[28]

Attorney General Butler, arguing on behalf of the Postmaster General in the late 1830's, told the Court:

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[26] *Id.* at 47. *See also id.* at 37 (Iredell); 3 Elliot's Debates 524-25 (George Mason), 554-55 (John Marshall).

[27] W. Maclay, *Sketches of Debate in the First Senate of the United States, 1789-'91* at 151 (1880).

[28] 3 J. Richardson, *Messages and Papers of the Presidents* 1288, 1290-1291 (1897).

> [W]henever the president takes an active part in an illegal action, to the injury of an individual, though it be done by the hand of his subordinate, he will be responsible in a civil suit, along with that subordinate
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> . . . .

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 599-600 (1838); *see also id.* at 600, 604.

Mr. Nixon's countervailing citation from the 1830's, like his other authorities, concerns the amenability of an incumbent President to process in a civil suit. The "official inviolability" that Justice Story referred to in his *Commentaries* was, by its own terms, limited to acts—arrest, imprisonment, and detention—that would obstruct or impede the President "while he is in the discharge of his duties of his office."[29] Neither Story nor any other source cited by Mr. Nixon supports the proposition that a former President, when out of office, is immune from civil liability for his acts while President.

The distinction between an incumbent and a former President is important. It was recognized at the time the Constitution was ratified.[30] And it was strenuously argued to this Court in 1867. Attorney General Stanbery then asserted on behalf of President Andrew Johnson that the President "is above the process of any court to bring him to account as President." But Stanbery acknowledged that this immunity ended with the President's removal from office. When "he no longer stands as the representative of the government," Stanbery said,

> then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

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[29] 3 J. Story, *Commentaries on the Constitution of the United States* § 1563 at 419 (1833 ed.), *quoted in* Nixon Brief at 25.

[30] *See* 4 Elliot's Debates 37 (Johnston), 293 (Barnwell).

Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 485 (1867).[31]

Petitioner Nixon relies on the lack of suits for damages against the President to support his contention that the President was understood to be immune. Nixon Brief at 26-27. But history reflects no such understanding. In 1811, a celebrated suit for damages was brought against a former President. The suit, a trespass action against Thomas Jefferson, was dismissed because it had been brought in the wrong district. *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8, 411).[32] Significantly, however, Jefferson made a claim much more like qualified than absolute immunity. In addition to raising the jurisdictional question, Jefferson asserted as a plea of justification that the act complained of was "done under a law of congress, and in his character of president of the United States, without malice." *Id.* at 661.

Rather than being the exception that proves the existence of a "general understanding," *Livingston v. Jefferson* illustrates a more probable reason for the absence of suits against the President: the difficulty of obtaining jurisdiction or proper venue against him. Through the nineteenth century, a suit could be brought against the incumbent President only in the nation's capital and against a former President only where he resided.[33]

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[31] After having served as President, William Howard Taft wrote in 1916 that, although the President "does have an official freedom as President from judicial process that is not unlike that royal prerogative in certain aspects," it "can not be said that he enjoys the royal prerogative in being above liability for a personal suit." Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 Yale L.J. 599, 603-04 (1916).

[32] The action was brought in Virginia, where Jefferson resided, although it alleged trespass under Jefferson's orders on land in Louisiana territory. The circuit court dismissed the suit because, while it was an *in personam* action, it was local in character.

[33] *See generally* 1 Moore's Federal Practice ¶¶ 0.141 [2-1], 0.142 [2-3]. Before 1962, a legal fiction provided that higher ranking

Where suit could more conveniently be brought against a lower official who carried out the President's orders, *see, e.g., Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804); *United States v. Lee*, 106 U.S. 196 (1882), it is not surprising that the President himself was not sued or joined in suit.

Other likely explanations for the scarcity of suits against Presidents and former Presidents include the slow development of the concept of actions in damages for redress of constitutional grievances and the discouraging effect on potential plaintiffs of *Spalding v. Vilas*, 161 U.S. 483 (1896),[34] and subsequent cases. Whatever the explanation, the lack of past suits is clearly not dispositive of the question before the Court.

B. The Decisions of the Court Do Not Support Absolute Presidential Immunity

The development of the doctrine of official immunity in recent years began with suits against state officials under 42 U.S.C. § 1983. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court held that state executive officials —including the governor—do not have absolute immunity in damage actions under section 1983. The *Scheuer* case, arising out of the events at Kent State University on May 4, 1970, illustrated the need for executive officers to act swiftly and decisively in some circumstances. The Court nonetheless unanimously decided that absolute immunity was not required to enable these officials to carry out their duties. "[I]n varying scope," Chief Justice Burger wrote for the Court, "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

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federal officers resided only where they were stationed, usually the District of Columbia. Joining them as defendants in a suit against a lower ranking officer required bringing the suit in the District. *See Stafford v. Briggs*, 444 U.S. 527, 534 (1980).

[34] *See* discussion at p. 35 *infra*.

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time . . . ." *Id.* at 247. While qualified immunity was justified by the policies of protecting executive officials against the hazards of litigation and promoting the public interest in effective decision-making, the Court recognized that "§ 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict . . . .'" *Id.* at 248.

In *Butz v. Economou*, 438 U.S. 478 (1978), the issue was whether in an action under the Constitution, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), federal executive officers were absolutely immune. The Court found the relevant precedents to be the cases concerning the immunity of state officials under section 1983. 438 U.S. at 496. It concluded that "there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983." *Id.* at 500. A grant of absolute immunity to all federal executive officials exercising discretion, the Court reasoned, would vitiate the cause of action authorized in *Bivens*. *Id.* at 505. Nor would it help to limit absolute immunity to a few officials at the top of the government hierarchy. "The broad authority possessed by these officials," the Court said, "enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property, and free speech." *Id.* It would make little sense, the Court observed, to hold the agent liable and excuse the transgressions of the principal:

> [T]he greater power of [high] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In

> situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Id. at 506. The Court held that, in *Bivens*-type actions, "federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507.

The message of the cases is plain. Absolute immunity is not a privilege of rank o. a badge of high office. The lowest-ranking local district attorney, when performing a prosecutorial function, is granted a greater degree of immunity than the highest elective official in the state. *Compare Imbler v. Pachtman*, 424 U.S. 409 (1976), *with Scheuer v. Rhodes*, 416 U.S. 232 (1974). The guiding factor in deciding whether absolute immunity is necessary is the nature of the function for which immunity is sought.

Some decision-making processes—such as those of the judge or prosecutor—are particularly vulnerable to the hazards and distractions of collateral civil liability. In judicial proceedings, moreover, procedural safeguards and the appellate process ensure that deliberate constitutional violations will be minimized. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). In view of these considerations, and of the long-established common law rule, the Court has recognized an absolute immunity shielding the official functions of judges and prosecutors from liability. Similarly, history has taught that the legislative functions protected by the Speech or Debate Clause must be insulated from liability to prevent the other branches from exercising an unduly inhibiting power over the deliberative processes of the legislative branch. *E.g.*, *United States v. Johnson*, 383 U.S. 169, 177-180 (1966). Legislators are "immune from deterrents to the uninhibited discharge of their legislative duty, not for their

private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

No similar rationale can justify a grant of *ex officio* absolute immunity to an executive official, whether state or federal. When an executive official violates the constitutional rights of a private citizen, he enjoys a qualified immunity only, unless he can demonstrate in an exceptional situation that absolute immunity is essential. *Butz v. Economou*, 438 U.S. 478 (1978).

The Court has recognized that governors, Cabinet officers, and other officials with broad responsibilities must not be paralyzed by the fear that a mere mistake of judgment will lead to a costly damage award against them. The qualified immunity established in *Scheuer* and *Butz* is designed to provide assurance that honest errors will not be penalized. "Yet," as the Court said in *Butz*, "*Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 438 U.S. at 506-07.

The rationale of the Court's decisions in *Scheuer* and *Butz* applies to the President. His position is analogous to that of a state governor.[35] Cabinet officers answer to the President and act, in many instances, at his direction. Under the rationale of *Butz*, the President should not be granted absolute immunity for actions for which these officials would not be absolutely immune.

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[35] In *The Federalist* No. 69, Hamilton compared the proposed presidential office to that of the governor of New York. *See also* E. Corwin, *The President: Office and Powers* 7 & n.10 (4th ed. 1957) (New York governorship a model for federal Presidency). Chief Justice Marshall observed that, with respect to his personal dignity and his amenability to court process, "the first magistrate of the Union may . . . properly be likened to the first magistrate of a state . . . ." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

In upholding the district court's determination in this case that Mr. Nixon is not entitled to absolute immunity, the Court need not foreclose the possibility of extending absolute immunity to the President, or any other federal executive officer, in exceptional situations where civil liability would interfere with the conduct of the public business. But if the civil disturbance at Kent State University was not such an exceptional situation for the governor of Ohio, *see Scheuer v. Rhodes*, surely this case does not involve an exceptional situation for the President.

Nothing in the Court's decisions to date supports, or even suggests, an absolute immunity as broad and inflexible as that proposed by petitioner Nixon. It follows that petitioners Harlow and Butterfield are not entitled to absolute immunity merely because they stood in the shadow of the Presidency. However much the position of presidential assistant may have grown in public attention and importance in modern times, and however useful his aides may be to the President, there can be no justification for granting them a higher degree of immunity than a Cabinet officer would be accorded in the same situation. Indeed, petitioners' novel and ahistorical assertion of "derivative immunity," *see* Harlow/Butterfield Brief at 28-30, amounts to suggesting that a Henry Kissinger or a James Schlesinger enjoys an absolute immunity while serving in the White House, but forfeits this immunity when he assumes the greater responsibilities of a Cabinet office. Surely this cannot be the law.

II. PUBLIC POLICY DOES NOT REQUIRE ABSOLUTE PRESIDENTIAL IMMUNITY

In *Butz v. Economou*, 438 U.S. at 506, the Court stated that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." Petitioner Nixon devotes a

substantial portion of his brief to an attempt to meet this burden. Nixon Brief at 28-44. He has not done so.

Petitioner Nixon's arguments obscure a crucial fact about the lawsuit at issue in this case. It was not brought against an incumbent President. Mr. Nixon was named as a defendant in July 1978, nearly four years after he resigned as President.[36] Whatever drain on his time and resources the suit has caused occurred long after he left office; it had no effect on his performance of public duties. Mr. Nixon is reduced to arguing that a suit against him for his actions while in office will have an inhibiting effect on the conduct of the Presidency by his successors. He offers not a whit of evidence that suits against him have affected the functioning of the office under President Ford, President Carter, or President Reagan.

Mr. Nixon does not present a case in which "the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. at 430. Instead, he advances two policy arguments, both of which are conjectural. First, he suggests that amenability to suit disrupts the Presidency by distracting the Chief Executive from his important duties. Second, he claims that the threat of suit will inhibit the President, preventing the fearless and vigorous performance of his duties and distorting his decisions. Qualified immunity does not solve these problems, he contends, because it does not sufficiently alleviate the burdens of discovery and trial. Indeed, Mr. Nixon goes so far as to argue that, if denied immunity at the out-

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[36] The district court has held that respondent acted diligently "in ferreting out [Nixon's] involvement," finding that "the trail to the highest office in the land was murky and the White House continued to conceal." Memorandum Regarding Statute of Limitations (March 26, 1980), *reprinted in* Nixon Cert. Petition at 6a, 8a, 10a.

set, the President or a former President may not receive a fair trial from a lay jury.[37]

Petitioner Nixon portrays the White House lawn aswarm with process-servers, bearing summonses in civil damage actions brought by his political foes, publicity-seekers, and "self-chosen 'private attorney generals.'" Nixon Brief at 31-33, 41. It is improbable in the extreme that political opponents will bring *damage* actions to thwart the President or his policies, given the expense and hazards of litigation and the availability of qualified immunity. Politically motivated litigants are far more likely to seek equitable relief than damages, and Mr. Nixon himself is not contending that the President is shielded from injunctive remedies. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Damage suits against the President for injuries with which he had only tangential involvement are unlikely to survive to trial. *See Rizzo v. Goode*, 423 U.S. 362 (1976). Where there is no injury at all—as in the case of a suit by a "self-chosen 'private attorney general'"—it is difficult to see how the suit could survive a motion to dismiss.

Mr. Nixon fails to explain why qualified immunity is not a sufficient answer to his concerns about the President's alleged susceptibility to suit. Governors have not been subjected to a flood of frivolous or misguided lawsuits since the Court decided *Scheuer v. Rhodes*, nor have high executive branch officials since the Court decided *Butz v. Economou*. These officials are also highly visible, and their actions are frequently controversial. Moreover, qualified immunity of the type accorded by *Scheuer* and *Butz* is not as empty a defense as Mr. Nixon suggests. It will almost certainly shield the President from trial

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[37] Mr. Nixon also suggests that there will be disruption of the Presidency in the second degree, with "other Presidents"—by which he presumably means other former Presidents and perhaps the incumbent—being called upon to testify as to the reasonableness of the defendant's action. Nixon Brief at 42 n.18.

for actions he takes that are grounded upon legal advice —advice that he is readily able to obtain and generally does. The fearless performance of presidential duties that the law ought to foster does not extend to actions the President should know violate the Constitution and statutes and that he undertakes with the malicious intent of violating the rights of an individual.

Mr. Nixon offers no reason why a former President, uniquely among citizens, should be spared the "burdens of modern litigation." As the Court recently stated, "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980), *quoting Petroleum Exploration, Inc. v. PSC*, 304 U.S. 209, 222 (1938). "[T]he way to minimize the burdens of litigation does not generally lie through abolition of a right of redress of an admitted wrong." *Barr v. Matteo*, 360 U.S. 564, 589 (1959) (Brennan, J., dissenting). The Court does not make decisions regarding the reach of constitutional protections, even for those whose "task . . . is indispensable in a system such as ours," on the basis of the costs of defending damage actions. *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (press protection from libel actions).

The burdens of litigation are not as onerous for the President or a former President as petitioner claims. With respect to the incumbent, the district court can stay all proceedings until he leaves office. Contrary to Nixon's assertion, a stay is likely to be at least as detrimental to the plaintiff's case as to the defendant's, since the defendant will have notice of the claim and an opportunity to prepare a defense in the interim. In civil litigation generally, it is defendants, not plaintiffs, who are thought to benefit from delay.

Mr. Nixon's contentions about the burdens of discovery are similarly wide of the mark. His characterization of discovery in this case omits to mention, for example, that Mr. Nixon's second deposition, as well as

the depositions of Haig, Kissinger, Laird, Schlesinger, and others, were taken at the instance of defendants, not the plaintiff. Moreover, he fails to credit the ability of the district courts to issue appropriate protective orders concerning the timing, order, and scope of discovery to limit the burden of defending those few suits that survive a motion to dismiss or for summary judgment. Fed. R. Civ. P. 26(c); *see Herbert v. Lando*, 441 U.S. at 177. While the burdens of discovery for any defendant are not to be underestimated, surely they are not a sufficient reason for according absolute immunity to the President.

Mr. Nixon's concerns about the fate of a former President or the incumbent President before a lay jury are also exaggerated. Most citizens are well aware of the difficulties a President faces, the vast scale of his responsibilities, and the great import of the problems he must address. Even those who disagree with his political philosophy or his decisions are likely to presume that the President is a man of personal integrity, honesty, and good will. The typical jury is likely to be an asset, not an obstacle to a President; any plaintiff will have difficulty persuading a jury that the Chief Executive maliciously violated the plaintiff's individual rights.

The thread that connects all of Nixon's arguments is the contention that qualified immunity is inadequate for the President because it is not a talisman that may be invoked to ward off all trials.[38] The Court has rejected petitioner's argument before. In *Butz*, the Court stated that qualified immunity "should prove as workable in suits against federal officials as it has in the context of

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[38] Harlow and Butterfield, who make the same point from the perspective of presidential advisers, also attack the district court's denial of their motion for summary judgment on the qualified immunity issue. Harlow/Butterfield Brief at 43-44. This portion of the district court's order was not appealed by petitioners, nor was it collaterally appealable. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981).

suits against state officials." 438 U.S. at 507. The Court went on to say:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, . . . damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harrassed by frivolous lawsuits.

Id. at 507-08 (citation and footnote omitted). There is no reason to assume that the Court's admonition has gone unheeded or that qualified immunity is less workable for the President and his advisers than it has proved in suits against state officers and other federal officers.[39]

Petitioner Nixon acknowledges that absolute immunity for the President will sacrifice the interests of individual plaintiffs, but contends that the sacrifice is bearable because individual rights are safeguarded by other judicial and administrative remedies, by the impeachment process, and by the President's political accountability. Nixon

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[39] Petitioners Harlow and Butterfield put forward as a panacea for the alleged deficiencies of the qualified immunity standard Judge Gesell's suggestion in his concurring opinion in *Halperin v. Kissinger*, 606 F.2d 1192, 1215 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 101 S. Ct. 3132 (1981), that the plaintiff be required to prove malice in pretrial proceedings "by the preponderance of the evidence or through clear and convincing evidence." Harlow/Butterfield Brief at 44-47. Serious seventh amendment problems would be raised by the application of a higher evidentiary standard at the pretrial stage than at a jury trial. In any event, this special standard would not have availed petitioners, since the evidence of malice in this case is substantial. *See, e.g.*, JA 183a, 282a.

Brief at 39-41. Violation of the rights of one individual is unlikely to turn an election—and, indeed, Mr. Nixon was reelected in 1972 after Fitzgerald was fired. Nor is it likely to set in motion the machinery of impeachment. And the political accountability of the President is attenuated, at best, when his involvement in an action is concealed until after he has left office. For individuals in Fitzgerald's shoes, there is no adequate substitute for money damages. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971); *see also* discussion at pp. 43-44 *infra*.

In the end, Mr. Nixon is contending that the balance between the public's interest in the effective functioning of the Presidency and the rights of individual plaintiffs weighs in favor of absolute immunity. But he offers little for his side of the scale. His sweeping hypotheses finally reduce to the simple assertion that the President will be cowed in the performance of his duties by the prospect of defending damage actions for maliciously violating individual rights. Surely that prospect is not so awesome, nor our Presidents so irresolute, as Mr. Nixon portrays them. The balance—for Presidents as for governors, for presidential advisers as for Cabinet officers—as this Court has held, favors qualified, not absolute immunity.

III. ABSOLUTE PRESIDENTIAL IMMUNITY IS NOT REQUIRED OR JUSTIFIED BY THE PRINCIPLE OF SEPARATION OF POWERS

Mr. Nixon argues that absolute immunity is essential to preserve the separation of powers and prevent judicial review of presidential motives, thought processes, and communications. Nixon Brief at 44-46. This is basically the same separation of powers argument presented by Nixon twice before and twice rejected by the Court. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 638, 707 (1974).

Mr. Nixon has not shown that the essential functions of the executive branch would be undermined by limiting the President to qualified immunity. More important, as this case illustrates, the essential functions of the other two branches of government would suffer if the President were absolutely immune.

The impact of absolute presidential immunity on the judicial branch is obvious. The federal courts have long played a significant role in deterring constitutional violations by government officials and in vindicating individual rights. *See Davis v. Passman*, 442 U.S. 228, 242 (1979); *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978). As the Court stated in *Butz v. Economou*, 438 U.S. at 505:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.

See also Halperin v. Kissinger, 606 F.2d at 1212-13.

This case plainly demonstrates that absolute presidential immunity can interfere even more drastically with the essential functioning of Congress. Ernest Fitzgerald was fired because he testified truthfully and honestly before a congressional committee gathering information about an important matter of public policy. This Court has long recognized that investigation and information gathering are essential parts of the legislative function. *See Nixon v. Administrator*, 433 U.S. at 498-99 (Powell, J., concurring in part and dissenting in part); *Tenney v. Brandhove*, 341 U.S. at 377. Without information on the internal workings of the executive branch, Congress cannot properly exercise its oversight function. *See Barr v. Matteo*, 360 U.S. at 576-78 (Black, J., concurring). To protect its access to information as well as to protect the rights of federal employees, Congress conferred upon them the right "to furnish information to either House of Congress" without interference. 5 U.S.C. § 7211. Con-

gress has also made it a felony to retaliate against a witness because of his testimony. 18 U.S.C. § 1505.[40] Meaningful enforcement of these rights requires that individual plaintiffs be able to seek damages for their violation. Any disruption resulting from granting the President only qualified immunity for violations of these statutes is plainly "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator*, 433 U.S. at 443.

By contrast, denying the President absolute immunity has minimal impact on the executive branch. Civil damage suits against a former President are surely far less intrusive on the presidential office than judicial orders commanding or restraining executive actions. Yet the latter are unquestionably permissible.[41] Moreover, Mr. Nixon exaggerates the extent to which conversations with presidential advisers need be revealed.[42] Many presidential communications will not be probative of qualified immunity issues. For those that are, the trial court

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[40] As a Senator, Mr. Nixon sponsored a proposed amendment to this law that would have created a presumption that adverse personnel actions against a congressional witness within one year of his testimony were retaliatory. *See* S. Rep. No. 414, 82d Cong., 1st Sess. 3 (1951). Senator Nixon said in support of his amendment, "Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist." 97 Cong. Rec. 4393-94 (1951).

[41] *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (injunction); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena *duces tecum* in criminal case); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (mandamus).

[42] Nixon mistakenly characterizes the "ultimate issue" in cases like this as "what the President 'knew or should have known.'" Nixon Brief at 46. What the President knew or should have known forms the objective portion of the qualified immunity standard; it relates only to the state of the law when the President acted, not his confidential communications.

must weigh the public interest in maintaining confidentiality—an interest that diminishes the longer a former President is out of office—against the public interest in providing a remedy for individuals whose rights have allegedly been violated. Furthermore, the court may restrict the use during pretrial proceedings of materials whose production is required, strictly limiting their copying and dissemination. Although the allocation of the burden of persuasion on a claim of qualified immunity is not yet fully established, a defendant President need not be penalized because the public interest requires that communications involving him remain confidential.[43]

The principle of separation of powers, far from supporting absolute presidential immunity, dictates that the President be granted qualified immunity only. Congress cannot function effectively if its sources of information about the activities of the executive branch are subject to an unrestrained power of presidential removal. The courts cannot fully perform their function of vindicating individual rights if the President can trample these rights at will. Qualified immunity no more prevents the President from performing his important functions than it does governors and Cabinet officials.

IV. PETITIONERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY BECAUSE THEY HAVE NOT ESTABLISHED THAT THEY ACTED WITHIN THE SCOPE OF THEIR AUTHORITY

Even if the Court, in a sharp break with its recent precedents, should adopt absolute immunity for constitutional and statutory violations by a former President and his assistants, summary judgment cannot be entered for petitioners because they have not established that they acted within the scope of their authority. The dis-

[43] The risk that litigation might compromise privileged confidential material may itself necessitate dismissal of a plaintiff's claims. *See Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam) (state secrets privilege).

trict court ruled that "[g]enuine issues of fact remain as to the scope of each defendant's responsibilities" and therefore none of them had shown that "he was acting 'within the outer perimeter' of his responsibilities . . . ." *Fitzgerald v. Butterfield*, Civ. No. 74-178 (D.D.C. Mar. 26, 1980), *reprinted in* Nixon Cert. Petition, App. at 2a-3a. While the district court made this ruling in connection with petitioners' claims of qualified immunity, it is also dispositive of their claims of absolute immunity, were such immunity otherwise available.

A. The Absolute Immunity Sought by Petitioners Should Not Apply to Conduct Outside the Scope of Their Authority

Historically, federal executive officials enjoyed absolute immunity from damage suits under state statutory or common law for actions within the scope of their authority. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896). This immunity was "not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Matteo*, 360 U.S. at 572-73. The Court limited the scope of immunity to conduct relating to " 'matters committed by law to [the official's] control or supervision.' " *Id.* at 573-74, *quoting Spalding v. Vilas*, 161 U.S. at 498. Where executive officials acted without authority, they had no immunity whatever. *Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804).

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court recognized a form of immunity for federal executive officials that is broader but less protective than traditional absolute immunity. Under *Butz*, executive officials are accorded qualified immunity—varying in application according to the nature and circumstances of the challenged action—for conduct that is alleged to violate the Constitution. This conduct would not have been protected at all under traditional principles. "*Barr* did not purport

to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution." *Id.* at 495 (footnote omitted).

Butz did not specify whether qualified immunity is limited by a requirement that the official claiming immunity was acting within the scope of his authority. The opinion suggests, however, that the scope of authority of the official is one of the factors to be weighed in determining the degree of immunity available. The qualified immunity test set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), and adopted for federal executive officials in *Butz*, provides:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the *scope of discretion and responsibilities of the office* and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

438 U.S. at 497 (emphasis added). Thus, qualified immunity, while variable, is still limited by the scope of the official's discretion and responsibilities.

Petitioner Nixon, and petitioners Harlow and Butterfield as well, argue that they should be absolutely immune not merely in the traditional sense—for common law torts committed within the scope of their authority—but rather for all actions while in office. An immunity of this reach cannot be justified. Any official immunity must be limited in its applicability.[44] Traditionally, this

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[44] Thus, in the case of judges, official immunity is limited to judicial acts; judges lose their absolute immunity if they act in the "clear absence of all jurisdiction." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871); *see Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). *See also Gregory v. Thompson*, 500 F.2d 59, 63-64 (9th Cir. 1974); *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970). The immunity of prosecutors and legislators is similarly

limit was provided by the scope of authority test. *See Barr v. Matteo*, 360 U.S. at 573-74. Under *Butz*, the limit was made a part of the qualified immunity test itself. But under the doctrine advanced by petitioners, there would be no limit. Any action that the President, or his aides, took under color of office would be absolutely immunized, even "actions manifestly beyond their line of duty." *Butz v. Economou*, 438 U.S. at 495.

If the Court adopts absolute immunity for the President, this immunity should be limited to actions that relate to "matters committed by law to his control or supervision." *Spalding v. Vilas*, 161 U.S. at 498. The Court should adopt Judge Learned Hand's formulation in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), and hold that the President, like any other officer, is acting within his power only when the occasion is "such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Where the President purports to exercise power that he does not possess, he should not have the same immunity that applies to powers that are "vested in him."

B. In Ordering the Firing of Fitzgerald, Petitioner Nixon Did Not Act Within the Scope of His Authority

Mr. Nixon himself described the action he took in this case. He stated publicly, while President, that the Fitzgerald firing was "not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it." JA 185a. He stated privately that he ordered Secretary Seamans to "get rid of that son of a bitch" as a specific response to Fitzgerald's congressional testimony. JA 214a-215a.

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limited. *See Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (prosecutors); *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (legislators); *United States v. Brewster*, 408 U.S. 501, 514 (1972) (same).

In taking this action, he was outside the scope of the President's historical and legal authority.

The scope of authority of the President is very broad, particularly in such fields as foreign affairs, *see, e.g., Dames & Moore v. Regan*, 101 S. Ct. 2972 (1981), and the command of the armed forces, *see, e.g., Madsen v. Kinsella*, 343 U.S. 341, 348 (1952). But the powers of the President are not unbounded. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In particular, the President's authority to remove subordinate federal officers is subject to well-defined limits.

The Constitution provides two methods for the statutory appointment of inferior officers. Congress may leave their appointment to the President, either alone or by and with the advice and consent of the Senate, or it may vest the appointing power "in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Whether the President is authorized to remove these officers depends upon which method Congress adopts.

Where the President appoints an officer, Congress cannot restrict his removal authority unless the official exercises quasi-legislative or quasi-judicial functions that are insulated from presidential control. *See Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). But where Congress vests the appointment power in the head of an executive department, Congress may validly limit the conditions under which the officer can be removed. *United States v. Perkins*, 116 U.S. 483 (1886); *see Myers v. United States*, 272 U.S. 52, 127 (1926) (Congress has "the power to limit and regulate removal of . . . inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them"); *National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C. Cir. August 11, 1981).

The power to appoint to Mr. Fitzgerald's job was vested in the Secretary of the Air Force. 10 U.S.C.

§ 8012(e); 5 C.F.R. § 213.3109. Congress had the power to limit, and did limit, the conditions under which Fitzgerald could be removed. Because he is a veteran, Fitzgerald could be removed from his job "only for such cause as will promote the efficiency of the service." Veterans' Preference Act, 5 U.S.C. § 7512(a); *see also* 5 C.F.R. § 752.201 *et seq.* As the court of appeals found, Fitzgerald had been accorded legislative protection. *Fitzgerald v. Hampton*, 467 F.2d 755, 762 (D.C. Cir. 1972). Once Congress had extended this protection, no federal official had authority to discharge Fitzgerald summarily. The President could no more ignore this legislative protection than could any other official of the executive branch. *See Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Roth v. Brownell*, 215 F.2d 500, 501 (D.C. Cir.), *cert. denied*, 348 U.S. 863 (1954).

Mr. Nixon asserts that as President he had authority to " 'prescribe' the manner in which Secretary Seamans would 'conduct the business of the Department [of the Air Force],' 10 U.S.C. § 8012(b)." Nixon Brief at 49. From this, he concludes that his order to fire Fitzgerald was authorized by statute.

The argument has a critical flaw. Secretary Seamans did not have the authority to discharge Fitzgerald summarily. The "reorganization" by which he purported to do so was a sham.[45] Unless the President's authority under 10 U.S.C. § 8012(b) to "prescribe" the manner in which the Secretary "conduct[s] the business" of the Air

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[45] The "reorganization" to remove Fitzgerald may have had its genesis when the Chairman of the Civil Service Commission advised Secretary Seamans that the "only alternative is to abolish his job." JA 205a. The CSC hearing examiner ruled that the "reorganization" was "influenced by, and resulted from, reasons that were personal to [Fitzgerald]" and therefore concluded that it was "improper, inappropriate and contrary to the spirit, intent, and letter of the Commission regulations." *CSC Decision, supra* note 6, at 20. Even Mr. Nixon recognized that the Fitzgerald firing had nothing to do with a neutral reorganization, but rather resulted from his "complaining about the overruns . . . in public." JA 221a.

Force includes the power to authorize unlawful actions by the Secretary, petitioner Nixon's argument fails.

Surely Congress did not intend section 8012(b) to authorize unlawful conduct. The provision itself speaks of the Secretary's authority in terms of such "activities as may be prescribed by the President or the Secretary of Defense *as authorized by law.*" (emphasis added) Far from being the grant of authority to the President that petitioner Nixon posits, section 8012(b) merely recognizes that the President may prescribe the actions of the Secretary as permitted by law. It does not authorize the President to direct the Secretary in the absence of law—and certainly not contrary to law.

Mr. Nixon's order to the Secretary of the Air Force to "get rid of" Fitzgerald was "manifestly and palpably" beyond the scope of his authority. *Spalding v. Vilas*, 161 U.S. at 498. Petitioner errs in suggesting, Nixon Brief at 48, that this determination collapses into the merits of the lawsuit. The scope of Mr. Nixon's authority did not depend upon his motive in ordering the firing. The President does not have the authority summarily to remove subordinate officers he did not appoint, and, as President, Nixon did not have the power summarily to remove Fitzgerald—for any purpose. As the district court concluded in response to one of Mr. Nixon's earlier motions for summary judgment, "By statute and regulation, the President had no authority to hire, discharge, or interfere with the employment of an employee such as Fitzgerald." JA 57a. Accordingly, petitioner Nixon is not entitled to absolute immunity in this case.

C. Petitioners Harlow and Butterfield Have Also Not Established that They Acted Within the Scope of Their Authority

The record supports the district court's finding that "genuine issues of fact" exist as to the scope of authority of petitioners Harlow and Butterfield. These two petitioners make virtually no attempt in their joint brief to

establish that their alleged actions related to "matters committed by law to their control or supervision." Without this essential element, their claim of immunity cannot prevail.

The record shows that Harlow was a congressional liaison aide and counsellor to the President. As such, he had no regular involvement in executive department personnel decisions. At his deposition, Harlow admitted that "Mr. Fitzgerald was not my wicket. I was charged with other matters." Harlow Dep. (R. 392) at 181. *See also* Schlesinger Dep. (R. 432) at 28. Butterfield was even further outside the perimeter of his White House duties. As he recalled in a 1973 interview, his role "was almost purely administrative" and did not include "advis[ing] Haldeman on anything." JA 297a. His "let him bleed" memorandum, allegedly sent to Haldeman and others in the White House to prepare for a press conference, was later described by Butterfield as having been done "not in any official way at all." *Id.* The testimony of other White House officials confirms that Butterfield was, as Ziegler described him, a mere "paper flow guy" who "would [not] have prepared substantive matters for a press conference." JA 175-176a. *See also* JA 108a. Official immunity should not shield these petitioners from liability for acts committed outside the perimeter of their official duties.

V. RESPONDENT FITZGERALD HAS PROPERLY ASSERTED CONSTITUTIONAL AND STATUTORY CAUSES OF ACTION IN THIS CASE

Petitioners Harlow and Butterfield question the district court's rulings that Fitzgerald has an implied private right of action under the first amendment and federal statutes.[46] While the issue has no place in this

[46] Along with Mr. Nixon, they also contend that the district court's decision on absolute immunity was immediately appealable as a collateral order. The court of appeals correctly dismissed petitioners' appeal in view of its decision in *Halperin v. Kissinger*. Respondent concedes, however, that, given this Court's disposition of *Halperin*, 101 S. Ct. 3132 (1981) (affirmance by an equally

proceeding, it is clear that a damages remedy is available in the circumstances of this case.

A. The Implied Cause of Action Issue Is Not Properly Before the Court

The district court's ruling that Fitzgerald has constitutional and implied statutory causes of action was not appealable as a collateral order, *cf. Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), nor was it certified for interlocutory appeal under 28 U.S.C. § 1292(b). The issue was not before the court of appeals. In their petition for a writ of certiorari, Harlow and Butterfield did not present the question for review. Rather, they expressly informed this Court that the issue was not "immediately appealable" and that it was not included in their notices of appeal to the court of apeals. *See* Harlow/Butterfield Cert. Petition at 14 n.9. Rule 34.1(a) of this Court states that a petitioner's brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari. In light of this rule, and the settled principle against hearing piecemeal interlocutory appeals, the Court should not consider the implied right of action issue.

B. Fitzgerald Is Entitled To Sue Under the First Amendment

Precedent and the expressed will of Congress support Mr. Fitzgerald's constitutional cause of action. Victims of a constitutional violation by a federal officer are entitled to bring suit against the officer for damages even in the absence of a statute expressly creating the cause of action. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Carlson v. Green*, 446 U.S. 14 (1980). *See also Davis v. Passman*, 442 U.S. 228 (1979). The re-

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divided Court), the denial of absolute immunity is now properly before the Court.

taliatory firing of Mr. Fitzgerald clearly violated his first amendment rights of free speech and petition.[47]

In *Bivens*, the Court held that a constitutional cause of action exists except where there are "special factors counselling hesitation in the absence of affirmative action by Congress," 403 U.S. at 396, or where "Congress has provided an alternative remedy which it explicitly declare[s] to be a *substitute* for recovery directly under the Constitution and view[s] as equally effective." *Carlson v. Green*, 446 U.S. at 18-19, *citing Bivens*, 403 U.S. at 397, and *Davis v. Passman*, 442 U.S. at 245-247. Neither exception applies here.

No "special concerns counsel hesitation" in this case. *Davis v. Passman* establishes that such concerns are "coextensive" with the scope of official immunity, there the legislative immunity conferred by the Speech or Debate clause, 442 U.S. at 246; *see Carlson v. Green*, 446 U.S. at 19. The second *Bivens* exception is equally inapplicable. No effective alternative remedy has been expressly provided by Congress. To the contrary, Congress apparently intended that a private right of action should be available to vindicate federal employees' rights in the face of official retaliation for congressional testimony. The partial relief Fitzgerald received as a result of his civil service appeal is not a substitute for *Bivens* damages, nor was it so intended by Congress. The Civil Service Commission was not empowered to grant Fitzgerald compensatory damages (other than back pay), interest on his judgment, or attorney's fees.[48] Fitzgerald's admin-

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[47] *Perry v. Sindermann*, 408 U.S. 593 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960). *See also Branti v. Finkel*, 445 U.S. 507, 514-15 (1980); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[48] Petitioners' claim that Mr. Fitzgerald's administrative remedy was adequate also runs counter to Congress' intent in providing special rights to veterans in federal government. If the administrative remedy were allowed to cut off access to *Bivens* relief, the effect would be to diminish the rights of veterans in comparison

istrative remedy was deficient in at least three further respects: (1) the absence of a deterrent purpose, (2) the unavailability of punitive damages, and (3) the lack of a right to jury trial. *See Carlson v. Green*, 446 U.S. at 20-21.

Petitioners rely heavily on *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469), in which the plaintiff's government employment was treated as a factor counselling hesitation. *Bush v. Lucas* is distinguishable from this case, since Congress had not expressly prohibited the conduct challenged there. To the extent that *Bush v. Lucas* holds that executive branch personnel decisions are too sensitive to be subject to court review, it was wrongly decided. Those who make personnel decisions "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green*, 446 U.S. at 19. Executive discretion in the personnel area is broad, but it is not unreviewable.[49]

C. Fitzgerald Has Implied Causes of Action Under Two Federal Statutes

Fitzgerald also has implied causes of action under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505 (1976). Private damage actions for violations of sec-

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with similarly situated nonveterans. But the Veterans' Preference Act was intended to expand the rights of veterans, *see e.g.*, H.R. Rep. No. 1289, 78th Cong., 2d Sess. 2-3 (1944). The statute itself prohibits a construction that would "take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law. . . ." Veterans' Preference Act of 1944, ch. 287, § 18, 58 Stat. 387.

[49] *See, e.g., Service v. Dulles*, 354 U.S. 363 (1957) (reinstatement and back pay action by discharged federal employee); *Daly v. Costle*, No. 79-2533 (D.C. Cir. Aug. 18, 1981) (damage action by federal employee against her superiors individually, alleging harassment because the employee was a Republican); *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981) (same, alleging harassment operating to nullify the due process job protection afforded by civil service law).

tion 7211 are neither directly provided by the statute nor discussed in its legislative history. Congressional silence, however, "is not inevitably inconsistent with an intent on its part to make such a remedy available. . . . Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) (citation omitted). *Cf. Cort v. Ash*, 422 U.S. 66, 78 (1975). In this case, the intent appears in all three.

First, section 7211 creates rights for the benefit of federal employees, a clearly identified class of persons that includes Fitzgerald. Statutory protection of a specific group that includes the plaintiff, as opposed to legislation for the benefit of the public at large, is a strong indication that Congress intended to create a private remedy in favor of members of the group. *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Petitioners' assertion that section 7211 was designed to protect the legislative process and not the rights of employees, Harlow/Butterfield Brief at 26 n.11, is belied by the provision's legislative history. What is now section 7211 [50] was originally enacted "to protect employees against oppression and in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 388, 62d Cong., 2d Sess. 7 (1912). "Gag rules" that had been imposed by executive order provided the impetus for section 7211's enactment. *See* Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909). In support of the legislation, members of Congress focused on the employees' welfare and interests.[51]

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[50] Post Office Appropriations Act of August 24, 1912, ch. 389, § 6, 37 Stat. 539 ("The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress or any Member thereof, or to furnish information to either House of Congress, or any committee or Member thereof, shall not be denied or interfered with.").

[51] *See, e.g.*, 48 Cong. Rec. 4656 (remarks of Rep. Reilly) ("[The gag rule] has as its name implied, effectually choked these em-

Second, while contemporaneous provision of an alternative remedy is evidence against an intent to create a private right of action, *see Transamerica*, 444 U.S. at 19-20, Congress did not provide an alternative remedy for violation of the rights conferred by section 7211 when it originally enacted the provision in 1912. Criminal sanctions for interference with congressional witnesses were not available until 1940.[52] Not until 1948 was there a provision granting back pay for wrongfully discharged employees in the classified civil service.[53] Most striking, even after the enactment of the predecessor of section 7211, many employees still possessed no statutory protection against discharge or demotion.[54] The absence of an effective remedy is persuasive evidence of congressional intent in 1912 to create a private cause of action under section 7211. Subsequent legislation that provided additional remedies (such as that in 1940 and 1948) was designed to strengthen, not weaken, enforcement of the rights conferred by section 7211. There is no basis for concluding that the subsequent legislation was intended to eliminate an implied cause of action created in 1912.

Third, the circumstances surrounding the enactment of section 7211 strongly suggest that congressional silence

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ployees and tied them hand and foot, and has prevented them from uttering any word of complaint even against the most outrageous treatment that could be heaped upon them."); *id.* at 10728 (remarks of Sen. Reed) ("I prepared the amendment I offered [the predecessor of section 7211] because I wanted at least to preserve *to these men* the right of petition to Congress." (emphasis added)).

[52] *See* Act of Jan. 13, 1940, ch. 1, 54 Stat. 13 (current version codified at 18 U.S.C. § 1505 (1976)).

[53] *See* Act of June 10, 1948, ch. 447, 62 Stat. 354 (current version codified at 5 U.S.C. § 5596(b) (Supp. III 1979)).

[54] Although the original version of section 7211 conferred the right to communicate with Congress on *all* "persons employed in the civil service of the United States," the right to be discharged only for cause and procedural protections to enforce that right were extended only to persons "in the *classified* civil service of the United States." Post Office Appropriation Act of August 24, 1912, ch. 389, § 6, 37 Stat. 539 (emphasis added).

concerning a private cause of action should not be construed to deny its existence. Congress was primarily concerned with sending the executive branch the message that interference with federal employees' communications with Congress would not be tolerated. Had Congress anticipated that the executive branch might ignore this statutory prohibition, it undoubtedly would have provided enforcement to the full extent of existing law. *See, e.g.*, note 51 *supra*.

Finally, section 7211 provides a context that justifies implying a private cause of action under 18 U.S.C. § 1505. *Cf. Cort v. Ash*, 422 U.S. 66, 79-80 (1975) (contrasting a bare criminal statute with criminal statutes that offer "a statutory basis for inferring that a civil cause of action of some sort be in favor of someone").

Petitioners suggest that a cause of action under a federal statute would be unavailing in any event. They erroneously claim that the plurality opinion in *Barr v. Matteo* grants federal executive officials absolute immunity from all except constitutional causes of action and that *Butz v. Economou* confirmed this immunity. *Barr v. Matteo* dealt with a suit under local libel law. As the Court observed in *Butz*, "a quite different question would have been presented had the [defendant] officer ignored an express statutory or constitutional limitation on his authority." 438 U.S. at 489. Although the question presented in *Butz* was limited to official immunity for constitutional torts, 438 U.S. at 495 n. 22, the Court's reasoning applies equally to statutory violations,[55] particularly where a statute was enacted to vindicate the constitutional rights of an expressly defined group that includes the plaintiff.

Section 7211 was intended to nullify certain executive orders and thus to curb presidential abuses of power.

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[55] Indeed, the Court in *Butz* took it to be established law that federal officers are liable "when they stray beyond the plain limits of their statutory authority . . . ," 438 U.S. at 495.

The group protected by section 7211—federal employees —was limited, and the group to whom the mandate of the statute was addressed—the President and subordinate executive officers—was even more sharply circumscribed. When Congress legislates concerning such a limited group of potential defendants, all of them federal officials, it must be held to have abrogated any absolute immunity they might otherwise have enjoyed.

Accordingly, the Court, if it chooses to consider the issue at all, should hold that implied private causes of action against petitioners exist under 5 U.S.C. § 7211 and 18 U.S.C. § 1505 and that Congress limited defendants in actions under these provisions to no more than qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the district court.

Respectfully submitted,

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